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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 RODNEY WAYNE JONES,  
12 CDCR #D-55894,

13 Plaintiff,

14  
15 vs.

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17 STUART J. RYAN, et al.,  
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20 Defendants.  
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Civil No. 07-1019 J JMA

**ORDER:**

**(1) GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTIONS TO DISMISS;**

**(2) DISMISSING DEFENDANTS  
TORRES AND BAILEY PURSUANT  
TO FED.R.CIV.P. 4(m); AND**

**(3) ORDERING REMAINING  
DEFENDANTS TO FILE AN  
ANSWER TO THE REMAINING  
CLAIMS**

**[Doc. Nos. 63, 95]**

22 Plaintiff, an inmate currently incarcerated at California State Prison located in Corcoran,  
23 California, and proceeding pro se, has filed a First Amended Complaint ("FAC") pursuant to 42  
24 U.S.C. § 1983 [Doc. No. 59]. Defendants Ryan, Ochoa, Jimenez, Zills, Schommer, Ortiz,  
25 Rodiles, Mejia, Sandoval, Wells, Castaneda, Cosio, Flores, Ritter, Bell, Anadalon, Harmon,  
26 Duarte, Stratton, Price, Martinez, Valenzuela and Rangel have filed Motions to Dismiss  
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1 Plaintiff's First Amended Complaint pursuant to FED.R.CIV. P. 12(b)(6) [Doc. Nos. 63, 95].<sup>1</sup>  
 2 In addition, Defendant Pegues has filed a Notice of Joinder and Joinder to Defendants' Motions  
 3 to Dismiss Plaintiff's First Amended Complaint [Doc. No. 64].

4 Because Defendants filed two Motions to Dismiss, one was filed after a number of newly  
 5 named Defendants had been served, Plaintiff has filed two Oppositions [Doc. Nos. 80, 96] to  
 6 which Defendants have filed a Reply [Doc. No. 83].

## 7 I.

### 8 PLAINTIFF'S FACTUAL ALLEGATIONS

9 In 2005 Plaintiff was housed at Centinela State Prison which is located in Imperial  
 10 County. (*See* FAC at 1.) On June 10, 2005, Plaintiff was awakened by his cell door being  
 11 pushed open and saw Defendants Schommer and Ortiz standing in front of his cell. (*Id.* at ¶¶  
 12 1-2.) Defendant Schommer told Plaintiff it was "count time" and Plaintiff informed Defendant  
 13 Schommer that he had fallen asleep because he was taking pain medication. (*Id.* at ¶¶ 3-4.)  
 14 Defendants Schommer and Ortiz walked away from Plaintiff's cell as Defendants Torres and  
 15 Mejia approached. (*Id.* at ¶¶ 6-7.) Defendant Wells closed Plaintiff's cell door from the control  
 16 tower. (*Id.* at ¶ 8). Defendants Schommer, Ortiz and Torres told Defendant Wells to reopen  
 17 Plaintiff's cell. (*Id.* at ¶ 12.) Defendants Schommer and Torres entered Plaintiff's cell and  
 18 began to simultaneously use oleresin capsicum (also known as "pepper spray") on Plaintiff who  
 19 was not resisting. (*Id.* at ¶¶ 14-18.)

20 While Plaintiff was shielding his face, he was struck on the lower left leg with a baton  
 21 by either Defendant Torres or Schommer and then struck on the right temple by Defendant  
 22 Torres. (*Id.* at ¶¶ 20-21.) Defendant Castaneda then entered Plaintiff's cell and placed Plaintiff  
 23 in handcuffs. (*Id.* at ¶ 22.) Defendant Castaneda then took Plaintiff to the shower in order to  
 24 "decontaminate" Plaintiff from the pepper spray but instead of using cold water, which is  
 25 required by regulations, Defendant Castaneda used hot water which caused Plaintiff's skin to  
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27 <sup>1</sup> While this matter was referred to Magistrate Judge Jan M. Adler, for disposition pursuant to  
 28 28 U.S.C. § 636(b)(1)(A) and S.D. CAL. CIVLR 72.3, the Court has determined that a Report and  
 Recommendation regarding Defendants' Motions to Dismiss is unnecessary. *See* S.D. CAL. CIVLR  
 72.3(a).

1 burn. (*Id.* at ¶¶ 23- 25.) Defendant Zills entered the shower area and began pushing Plaintiff  
2 to the exit of the housing unit by his handcuffs. (*Id.* at ¶¶ 27-28.) While exiting through the  
3 corridor area, Defendant Zills “ran Plaintiff face first into the corridor’s brick wall.” (*Id.* at ¶  
4 29.) Plaintiff was then “slammed to the ground” by Defendants Zills and Torres. (*Id.* at ¶ 31.)  
5 As Defendant Zills held Plaintiff, “Defendants Torres, Ortiz and Rodiles proceeded to take turns  
6 striking Plaintiff in the head and body utilizing their state-issued side handle batons.” (*Id.* at ¶  
7 32.) As Defendant Zills continued to hold Plaintiff, Defendant Mejia “walked over and kicked  
8 Plaintiff.” (*Id.* at ¶ 35.) In addition, Defendant Sandoval began “viciously [kicking] Plaintiff”  
9 in his chest “with enough force that [caused] Plaintiff to temporarily stop breathing.” (*Id.* at ¶  
10 37.) Defendant Castaneda began to yell in Spanish “that’s it.” (*Id.* at ¶ 39.) Plaintiff claims that  
11 Defendants Castaneda, Jimenez, Bailey, Cosio, Bell and Andalon “observed Plaintiff being  
12 maliciously and wantonly beaten” but failed to intervene. (*Id.* at ¶ 40.)

13 Defendants placed Plaintiff in the shower to remove any signs of blood and then  
14 proceeded to take Plaintiff to the medical clinic by Defendants Torres, Jimenez and Bell. (*Id.*  
15 at ¶ 42-44.) Plaintiff claims that Defendants Jimenez and Torres “intentionally [delayed]  
16 Plaintiff from receiving medical evaluation and treatment” by keeping Plaintiff in a holding cell  
17 for two hours inside the medical clinic. (*Id.* at ¶¶ 46-47.) Plaintiff was later examined by  
18 medical staff and it was determined that he should be seen by the prison’s physician. (*Id.* at ¶  
19 50.) While Plaintiff was waiting to be seen by the prison’s physician he claims that Defendants  
20 Harmon and Duarte made “obscene/vulgar statements directed at Plaintiff.” (*Id.* at ¶¶ 53-54.)  
21 Plaintiff was examined by “Doctor Naz,” the prison’s physician, who “sutured Plaintiff’s three  
22 scalp lacerations and one left leg laceration and evaluated plaintiff as having a possible liver  
23 rupture and chest wall contusion.” (*Id.* at ¶ 56.) Defendants Stratton and Mejia videotaped  
24 Plaintiff’s injuries. (*Id.* at ¶ 57.) Defendants Ryan, Ochoa and Pegues arrived soon after and  
25 asked Plaintiff’s questions regarding the incidents that led to his injuries. (*Id.* at ¶ 58.)

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1 Doctor Naz recommended that Plaintiff be immediately transferred to Pioneer Memorial  
 2 Hospital (“PMH”) due to his potentially “life-threatening injuries.” (*Id.* at ¶ 60.) Defendants  
 3 Ryan, Ochoa, Pegues and Stratton “refused to act or expedite Plaintiff’s transfer to PMH and  
 4 instead intentionally allowed Plaintiff’s suffering condition to deteriorate.” (*Id.* at ¶ 61.) At  
 5 approximately 4:34 a.m. on June 11, 2005, Plaintiff was transferred to the PMH emergency  
 6 room. (*Id.* at ¶ 63.) Plaintiff underwent medical examinations and testing where it was  
 7 determined that he suffered from a “punctured and collapsed right lung, a minimum of four  
 8 broken right ribs, three severe scalp lacerations, one left leg laceration, and multiple abrasions,  
 9 bruising and swelling throughout Plaintiff’s body.” (*Id.* at ¶ 65.) Plaintiff claims Defendants  
 10 Jimenez, Torres, Schommer, Ortiz, Zills, Rodiles, Wells, Flores and Ritter submitted “fabricated  
 11 disciplinary reports against Plaintiff” to “conceal” their own misconduct. (*Id.* at ¶¶ 68-70.)  
 12 Defendant Flores submitted a report indicating that he had discovered an inmate manufactured  
 13 weapon in Plaintiff’s cell which Plaintiff claims is a false accusation. (*Id.* at ¶ 71.)

14 Plaintiff was charged with disciplinary violations including assault on staff, battery on  
 15 staff, battery on a Peace Officer with a weapon and attempted murder of a Peace Officer. (*Id.*  
 16 at ¶ 73.) Plaintiff also claims that his property was taken by Defendants in retaliation for  
 17 Plaintiff’s allegations against Defendants. (*Id.* at ¶¶ 93-95.) To date, Plaintiff has yet to receive  
 18 a disciplinary hearing on the rules violation report that was issued to him charging Plaintiff with  
 19 attempted murder of a Peace Officer. (*Id.* at ¶ 100.) However, Plaintiff does indicate that he is  
 20 being temporarily housed at Calipatria State Prison “pending court proceedings in Imperial  
 21 County Superior Court.” (*Id.* at 16, fn. 13.)

## 22 II.

### 23 DEFENDANTS’ MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(6)

#### 24 A. Standard of Review pursuant to FED.R.CIV.P. 12(b)(6)

25 A Rule 12(b)(6) dismissal may be based on either a “‘lack of a cognizable legal theory’  
 26 or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *Johnson v.*  
 27 *Riverside Healthcare System, LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri*  
 28 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)). In other words, the plaintiff’s

1 complaint must provide a “short and plain statement of the claim showing that [he] is entitled  
2 to relief.” *Id.* (citing FED.R.CIV.P. 8(a)(2)). “Specific facts are not necessary; the statement  
3 need only give the defendant[s] fair notice of what ... the claim is and the grounds upon which  
4 it rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (internal quotation  
5 marks omitted).

6 Still, every complaint must, at a minimum, plead “enough facts to state a claim for relief  
7 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Weber v.*  
8 *Dept. of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). Facts which are alleged in the  
9 complaint are presumed true, and the court must construe them and draw all reasonable  
10 inferences from them in favor of the plaintiff. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336,  
11 337-38 (9th Cir. 1996).

12 In addition, factual allegations asserted by pro se petitioners, “however inartfully  
13 pleaded,” are held “to less stringent standards than formal pleadings drafted by lawyers.”  
14 *Haines v. Kerner*, 404 U.S. 519-20 (1972). Thus, where a plaintiff appears in propria persona  
15 in a civil  
16 rights case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the  
17 doubt. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

18 Nevertheless, and in spite of the deference the court is bound to pay to any factual  
19 allegations made, it is not proper for the court to assume that “the [plaintiff] can prove facts  
20 which [he or she] has not alleged.” *Associated General Contractors of California, Inc. v.*  
21 *California State Council of Carpenters*, 459 U.S. 519, 526 (1983). Nor must the court “accept  
22 as true allegations that contradict matters properly subject to judicial notice or by exhibit” or  
23 those which are “merely conclusory,” require “unwarranted deductions” or “unreasonable  
24 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.) (citation omitted),  
25 *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001); *see also Iletto v. Glock Inc.*, 349 F.3d  
26 1191, 1200 (9th Cir. 2003) (court need not accept as true unreasonable inferences or conclusions  
27 of law cast in the form of factual allegations).

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**B. Eighth Amendment allegations - Count "1"**

**1. Claims against Defendant Ritter**

Defendant Ritter moves to dismiss the Eighth Amendment claims against him found in Count "1" of Plaintiff's First Amended Complaint for failing to state a claim upon which relief can be granted pursuant to FED.R.CIV.P. 12(b)(6).

"After incarceration, only the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitely v. Albers*, 475 U.S. 312, 319 (1986). To assert an Eighth Amendment claim for deprivation of humane conditions of confinement, a prisoner must allege facts sufficient to fulfill two requirements: one objective and one subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the objective requirement, the prisoner must allege facts sufficient to show that the prison official's acts or omissions deprived him of the "minimal civilized measure of life's necessities." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Farmer*, 511 U.S. at 834. This objective component is satisfied so long as the institution "furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982); *Farmer*, 511 U.S. at 832; *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981).

Under the subjective requirement, the prisoner must allege facts that show that the defendant acted with "deliberate indifference." *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). "Deliberate indifference" exists when a prison official "knows of and disregards an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837; *Wilson*, 501 U.S. at 302-303.

In Plaintiff's First Amended Complaint he alleges that Defendant Ritter "photographed Plaintiff's external injuries" after he had been taken to the prison infirmary. (FAC at ¶ 9.) Later Plaintiff alleges that Defendant Ritter "submitted fabricated disciplinary reports against Plaintiff with a specific intent to retaliate and harm Plaintiff." (*Id.* at ¶ 68.) Based on these allegations, there is simply no factual basis to support a claim for deliberate indifference by Defendant

1 Ritter for merely photographing Plaintiff's injuries.

2 In Plaintiff's Opposition dated January 23, 2009, Plaintiff argues that "subsequent to  
3 Defendant Ritter's arrival at the prison infirmary and observation of Plaintiff's gross physical  
4 condition, Defendant Ritter's official obligation and responsibility was to take reasonable  
5 measures to guarantee Plaintiff's safety." (See Pl.'s Opp'n at 4.) However, the facts alleged by  
6 Plaintiff do not demonstrate that Defendant Ritter played any role in inhibiting or delaying his  
7 medical treatment. Nor does Plaintiff provide any facts that would demonstrate that the actions  
8 of Defendant Ritter caused him any further harm. The only allegation that Plaintiff refers to is  
9 the alleged fabricated disciplinary report that Defendant Ritter allegedly prepared eight months  
10 after the incident. (See FAC at ¶ 72.) However, Plaintiff later admits that he has not been  
11 subjected to a disciplinary hearing as a result of these alleged fabricated disciplinary reports.  
12 (*Id.* at ¶ 100.)

13 Thus, Defendant Ritter's Motion to Dismiss the Eighth Amendment claims against him  
14 pursuant to FED.R.CIV.P. 12(b)(6) is **GRANTED** without leave to amend.

## 15 2. Claims against Defendants Harmon and Duarte

16 Defendants Harmon and Duarte also seek dismissal of all claims against them found in  
17 Count "1" of Plaintiff's First Amended Complaint. In Plaintiff's First Amended Complaint, the  
18 allegations against these Defendants are that they made "obscene/vulgar statements directed at  
19 Plaintiff that caused Plaintiff further physical and emotional distress" while he was waiting for  
20 the prison's physician to examine him. (See FAC at ¶ 54.) These Defendants were not alleged  
21 to be present prior to or during the incident which caused Plaintiff's injuries.

22 Verbal harassment or verbal abuse by prison officials generally does not constitute a  
23 violation of the Eighth Amendment. See *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996)  
24 (harassment does not constitute an Eighth Amendment violation); *Oltarzewski v. Ruggiero*, 830  
25 F.2d 136, 139 (9th Cir. 1987) (harassment in the form of vulgar language directed at an inmate  
26 is not cognizable under § 1983); *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993) (verbal  
27 threats and name calling are not actionable under § 1983). While Plaintiff alleges in his First  
28 Amended Complaint that the alleged harassment caused him additional physical injuries, he does

1 not specify what those injuries were. Plaintiff appears to clarify this claim in his Opposition to  
2 Defendants' Motion dated April 9, 2009 in which he states that the verbal harassment caused  
3 him "psychological harm." (*See* Pl.'s Opp'n at 2.)

4 The Prison Litigation Reform Act ("PLRA") states, in part, that "[n]o Federal civil action  
5 may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental  
6 or emotional injury suffered while in custody without a prior showing of physical injury." 42  
7 U.S.C. § 1997e(e). This provision requires "a prior showing of physical injury that need not be  
8 significant but must be more than de minimus." *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir.  
9 2002). Here, as set forth in Plaintiff's First Amended Complaint and Opposition, the only injury  
10 that he claims with respect to the actions of Defendants Duarte and Harmon is a psychological  
11 injury.

12 Thus, for all these reasons, the Court **GRANTS** Defendants Harmon and Duarte's Motion  
13 to Dismiss the Eighth Amendment claims against them pursuant to FED.R.CIV.P. 12(b)(6)  
14 without leave to amend.

#### 15 **D. Fourteenth Amendment Claims**

##### 16 **1. Due Process Claims**

17 Defendants Andalon, Mejia, Sandoval, Castaneda, Cosio, Bell, Ochoa, Price and Stratton  
18 move to dismiss Plaintiff's Count "2" claims in which he alleges that his Fourteenth Amendment  
19 due process rights were violated by the alleged false reports written by several of the named  
20 Defendants. For the reasons set forth below, Plaintiff's Fourteenth Amendment claims against  
21 all Defendants should be dismissed as they are not yet cognizable.

22 The Due Process Clause prohibits states from "depriving any person of life, liberty, or  
23 property, without the due process of law." U.S. CONST. AMEND. XIV. The procedural  
24 guarantees of due process apply only when a constitutionally-protected liberty or property  
25 interest is at stake. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). In order to invoke  
26 the protection of the Due Process Clause, Plaintiff must first establish the existence of a liberty  
27 interest. *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384 (2005); *Sandin v. Conner*, 515 U.S.  
28 472 (1995). In *Sandin*, the Supreme Court "refocused the test for determining the existence of

1 a liberty interest away from the wording of prison regulations and toward an examination of the  
2 hardship caused by the prison's challenged action relative to the 'basic conditions' of life as a  
3 prisoner." *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) (citing *Sandin*, 515 U.S. at 484);  
4 *McQuillion v. Duncan*, 306 F.3d 895, 902-03 (9th Cir. 2002) (noting that *Sandin* abandons the  
5 mandatory/permissive language analysis courts traditionally looked to when determining  
6 whether a state prison regulation created a liberty interest which required due process  
7 protection).

8 Thus, "[a]fter *Sandin*, it is clear that the touchstone of the inquiry into the existence of  
9 a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not  
10 the language of regulations regarding those conditions but the nature of those conditions  
11 themselves 'in relation to the ordinary incidents of prison life.'" *Wilkinson*, 125 S.Ct. at 2394.  
12 The *Sandin* test requires a case-by-case examination of both the conditions of the prisoner's  
13 confinement and the duration of the deprivation at issue. *Sandin*, 515 U.S. at 486.

14 The Court must determine whether Plaintiff has established a protected liberty interest.  
15 Accordingly, under *Sandin*, the Court must determine whether the alleged fabrication of  
16 disciplinary reports "imposes atypical and significant hardship on the inmate in relation to the  
17 ordinary incidents of prison life." *Id.* at 484. In *Sandin*, the Court found there were three factors  
18 to consider when determining whether disciplinary segregation imposes atypical and significant  
19 hardship: "(1) disciplinary segregation was essentially the same as discretionary forms of  
20 segregation; (2) a comparison between the plaintiff's confinement and conditions in the general  
21 population showed that the plaintiff suffered no "major disruption in his environment"; and the  
22 length of the plaintiff's sentence was not affected." *Jackson v. Carey*, 353 F.3d 750, 755  
23 (quoting *Sandin*, 515 U.S. at 486-87).

24 Here, Plaintiff admits that he has never been subject to a disciplinary hearing resulting  
25 from these alleged falsified reports. (See FAC at ¶ 100.) He does not allege that he was ever  
26 sentenced to administrative segregation. Instead, it appears that a criminal action was instigated  
27 in the Imperial County Superior Court against Plaintiff for the events that occurred on June 10,  
28 2005. Plaintiff makes allegations of perjury and false reports before the Grand Jury in the

1 Imperial County Superior Court. (*See* FAC at ¶ 103.) Plaintiff cannot bring these claims in this  
2 action while his criminal proceeding is ongoing.

3       These claims are barred by the favorable termination doctrine set forth in *Heck v.*  
4 *Humphrey*, 512 U.S. 477, 486-87 (1994). Plaintiff's claims amount to an attack on the  
5 constitutional validity of his ongoing state criminal proceeding, and as such, may not be  
6 maintained pursuant to 42 U.S.C. § 1983 unless and until he can show that conviction has  
7 already been invalidated. *Heck*, 512 U.S. at 486-87; *Ramirez*, 334 F.3d at 855-56.

8       “In any § 1983 action, the first question is whether § 1983 is the appropriate avenue to  
9 remedy the alleged wrong.” *Haygood v. Younger*, 769 F.2d 1350, 1353 (9th Cir. 1985) (en  
10 banc). A prisoner in state custody simply may not use a § 1983 civil rights action to challenge  
11 the “fact or duration of his confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). The  
12 prisoner must seek federal habeas corpus relief instead. *Wilkinson v. Dotson*, 544 U.S. 74, 78  
13 (2005) (*quoting Preiser*, 411 U.S. at 489). Thus, Plaintiff's § 1983 action “is barred (absent  
14 prior invalidation)--no matter the relief sought (damages or equitable relief), no matter the target  
15 of his suit (state conduct leading to conviction or internal prison proceedings)--if success in that  
16 action would necessarily demonstrate the invalidity of confinement or its duration.” *Wilkinson*,  
17 544 U.S. at 82.

18       In this case, Plaintiff's claims “necessarily imply the invalidity” of his ongoing criminal  
19 proceedings. *Heck*, 512 U.S. at 487. In creating the favorable termination rule in *Heck*, the  
20 Supreme Court relied on “the hoary principle that civil tort actions are not appropriate vehicles  
21 for challenging the validity of outstanding *criminal judgments*.” *Heck*, 511 U.S. at 486  
22 (emphasis added); *see also Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005).  
23 This is precisely what Plaintiff attempts to accomplish here. Therefore, to satisfy *Heck*'s  
24 “favorable termination” rule, Plaintiff must first allege facts which show that the conviction and  
25 sentence has already been: (1) reversed on direct appeal; (2) expunged by executive order;  
26 (3) declared invalid by a state tribunal authorized to make such a determination; or (4) called  
27 into question by the grant of a writ of habeas corpus. *Heck*, 512 U.S. at 487 (emphasis added);  
28 *see also Butterfield v. Bail*, 120 F.3d 1023, 1025 (9th Cir. 1997).

1 For all these reasons, Defendants Motions to Dismiss Plaintiff's Fourteenth Amendment  
2 Due Process claims found in Count "2" are **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6)  
3 without leave to amend.

## 4 2. Equal Protection Claims

5 Defendants seek dismissal of Plaintiff's Fourteenth Amendment Equal Protection claims  
6 found in Count "2" of Plaintiff's First Amended Complaint. The "Equal Protection Clause of  
7 the Fourteenth Amendment commands that no State shall 'deny to any person within its  
8 jurisdiction the equal protection of the laws,' which is essentially a direction that all persons  
9 similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S.  
10 432, 439 (1985); *Shaw v. Reno*, 509 U.S. 630 (1993).

11 However, conclusory allegations of discrimination are insufficient to withstand a motion  
12 to dismiss, unless they are supported by facts that may prove invidious discriminatory intent or  
13 purpose. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).  
14 Therefore, when an equal protection violation is alleged, the plaintiff must plead facts to show  
15 that the defendant "acted in a discriminatory manner and that the discrimination was  
16 intentional." *FDIC v. Henderson*, 940 F.2d 465, 471 (9th Cir. 1991) (citations omitted).  
17 "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of  
18 consequences. It implies that the decision maker . . . selected or reaffirmed a particular course  
19 of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an  
20 identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

21 Here, Plaintiff's First Amended Complaint is devoid of any facts to show that he was  
22 discriminated against in any manner or that he was treated differently from any other class of  
23 prisoners. Plaintiff's Oppositions shed no light on this issue either, other than to say that  
24 Defendants had an "illegitimate desire to 'get' him." (*See* Apr. 9, 2009 Opp'n at 5.) Thus,  
25 Plaintiff has plead no facts from which the Court could find he has stated a Fourteenth  
26 Amendment equal protection claim. Accordingly, Defendants' Motions to Dismiss Plaintiff's  
27 Fourteenth Amendment Equal Protection claim pursuant to FED.R.CIV.P. 12(b)(6) is  
28 **GRANTED** without leave to amend.

1           **E.      Fourth Amendment Claims - Count “3”**

2           Defendants move to dismiss Plaintiff’s Fourth Amendment unreasonable search and  
3 seizure claims. There are two separate constitutional violations claimed by Plaintiff with  
4 respect to his Fourth Amendment claims. One claim for an alleged constitutional violation  
5 appears to be that Plaintiff claims his Fourth Amendment rights were violated by the mere entry  
6 of Defendants Torres and Schommer into his cell. The second incident is a cell search  
7 conducted by Price on June 13, 2005. (*See* FAC at ¶¶ 17-23, 93-95.) Although prisoners enjoy  
8 some protections under the Constitution, imprisonment carries with it the loss of many  
9 significant rights. *Hudson v. Palmer*, 468 U.S. 517, 524 (1984); *Bell v. Wolfish*, 441 U.S. 520,  
10 537 (1979) (“Loss of freedom of choice and privacy are inherent incidents of confinement.”).  
11 The curtailment of certain rights is necessary to accommodate a myriad of prison objectives,  
12 chief among which is internal security. *Id.*; *Taylor v. Knapp*, 871 F.2d 803, 806 (9th Cir. 1989).  
13 A prisoner’s expectation of privacy must always yield to the paramount interest in prison  
14 security. *Hudson*, 468 U.S. at 528. Thus, a prisoner does not have a legitimate expectation of  
15 privacy, and the Fourth Amendment proscription against unreasonable searches does not apply  
16 within the confines of a prison cell. *See id.* at 526, 536; *Mitchell v. Dupnik*, 75 F.3d 517, 522  
17 (9th Cir. 1996). Thus, Plaintiff cannot state a Fourth Amendment claim against any Defendant  
18 for entering or searching his cell.

19           To the extent that Plaintiff is seeking to allege a Fourth Amendment claim against Torres  
20 and Schommer for the actions they allegedly took against him while he was in his cell, he has  
21 already brought these claims under the Eighth Amendment. “Where an amendment ‘provides  
22 an explicit textual source of constitutional protection against a particular sort of government  
23 behavior,’ it is that Amendment, that ‘must be the guide for analyzing the complaint.’” *Picray*  
24 *v. Sealock*, 138 F.3d 767, 770 (9th Cir. 1998) (citing *Albright v. Oliver*, 510 U.S. 266, 273  
25 (1994) (plurality opinion)).

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1 In addition, to the extent that Plaintiff is seeking to bring a Fourth Amendment claim  
2 related to the alleged unauthorized taking of his property by Defendant Price, the Court had  
3 granted Defendants' previous Motion to Dismiss and denied Plaintiff leave to amend this claim.  
4 (*See* Sept. 25, 2008 Order at 15.)

5 Accordingly, for all the reasons set forth above, Defendants' Motions to Dismiss  
6 Plaintiff's Fourth Amendment claims are **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6) without  
7 leave to amend.

8 **F. First Amendment Claims - Count "4"**

9 Defendants Harmon, Duarte, Stratton, Mejia and Sandoval move to dismiss Plaintiff's  
10 First Amendment claims against them on the grounds that there are no facts alleged to support  
11 a claim against them. Plaintiff claims his First Amendment rights have been violated because  
12 he has been denied the "right to petition the government for a redress of grievances" and "acts  
13 of retaliation and acts of intimidation." (FAC at 17.)

14 **1. Right to Petition the Government/Access to Courts Claim**

15 Inmates "have a constitutional right to petition the government for redress of their  
16 grievances, which includes a reasonable right of access to the courts." *O'Keefe v. Van Boening*,  
17 82 F.3d 322, 325 (9th Cir. 1996); *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In order  
18 to establish a violation of the right of access to the courts, however, an inmate must allege facts  
19 sufficient to show that: (1) a nonfrivolous legal attack on his conviction, sentence, or conditions  
20 of confinement has been frustrated or impeded, and (2) he has suffered an actual injury as a  
21 result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An "actual injury" is defined as "actual  
22 prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing  
23 deadline or to present a claim." *Id.* at 348.

24 Plaintiff has not stated a claim for denial of access to the courts because he has not  
25 alleged any facts sufficient to show that he has been precluded from pursuing a non-frivolous  
26 direct or collateral attack upon either his criminal conviction or sentence or the conditions of his  
27 current confinement. *See Lewis*, 518 U.S. at 355 (right to access to the courts protects only an  
28 inmate's need and ability to "attack [his] sentence[], directly or collaterally, and . . . to challenge

1 the conditions of [his] confinement.”); *see also Christopher v. Harbury*, 536 U.S. 403, 415  
 2 (2002) (the non-frivolous nature of the “underlying cause of action, whether anticipated or lost,  
 3 is an element that must be described in the complaint.”)

4 There are no allegations whatsoever that interference with his administrative grievances,  
 5 alleged interference with his legal mail or the loss of his legal documents caused any injury at  
 6 all, much less the type of “actual injury” required to state a claim under *Lewis*. Thus,  
 7 Defendants’ Motion to Dismiss Plaintiff’s Access to Court’s claim is **GRANTED** without leave  
 8 to amend.

## 9 2. Retaliation claim

10 Defendants Harmon, Duarte, Stratton,<sup>2</sup> Mejia and Sandoval also seek dismissal of  
 11 Plaintiff’s retaliation claim. A plaintiff suing prison officials pursuant to § 1983 for retaliation  
 12 must allege sufficient facts to show: (1) he was retaliated against for exercising his  
 13 constitutional rights, (2) the alleged retaliatory action “does not advance legitimate penological  
 14 goals, such as preserving institutional order and discipline,” *Barnett v. Centoni*, 31 F.3d 813,  
 15 815-16 (9th Cir. 1994) (per curiam), and (3) the defendants’ actions harmed him. *See Resnick*  
 16 *v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997);  
 17 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

18 Courts must “‘afford appropriate deference and flexibility’ to prison officials in the  
 19 evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory.”  
 20 *Pratt*, 65 F.3d at 807 (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)). Thus, the burden  
 21 is on the prisoner to allege facts which demonstrate “that there were no legitimate correctional  
 22 purposes motivating the actions he complains of.” *Id.* at 808.

23 Plaintiff’s First Amended Complaint is devoid of any facts from which the Court could  
 24 find that Defendants Harmon, Duarte, Stratton, Mejia or Sandoval retaliated against him.  
 25 Plaintiff has not alleged any facts to show that the actions of the Defendants were in response  
 26 to Plaintiff exercising his constitutional rights. Plaintiff’s Oppositions refer to the Defendants  
 27

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28 <sup>2</sup> Defendant Stratton is not named as a Defendant in Plaintiff’s First Amendment claim, Count  
 “4.” (*See* FAC at 17.)

1 “ominous appearance” but their mere presence is not enough to state a retaliation claim. (*See*  
 2 Pl.’s Jan. 23, 2009 Opp’n at 16.) Plaintiff’s only reference to Defendant Mejia is that he arrived  
 3 at Plaintiff’s hospital bed and “as a mere formality videotaped Plaintiff.” (FAC at ¶ 57.) It is  
 4 unclear how the videotaping of Plaintiff’s injuries would be used to retaliate against Plaintiff.  
 5 In addition, Plaintiff has not alleged any facts to show that the Defendants actions lacked or  
 6 failed to advance “legitimate penological goals such as preserving institutional order and  
 7 discipline.” *Barnett*, 31 F.3d at 815-16; *Pratt*, 65 F.3d at 808; *Bruce*, 351 F.3d at 1289. For  
 8 all these reasons, Defendants’ Harmon, Duarte, Stratton, Mejia and Sandoval’s Motions to  
 9 Dismiss Plaintiff’s retaliation claims are **GRANTED** for failure to state a claim upon which  
 10 relief can be granted pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

11 **G. Conspiracy Claims pursuant to 42 U.S.C. §§ 1985(3) and 1986 - Count “5”**

12 Defendants seek dismissal of Plaintiff’s conspiracy claims that he has brought pursuant  
 13 to 42 U.S.C. §§ 1985(3) and 1986. “To state a cause of action under § 1985(3), a complaint  
 14 must allege (1) a conspiracy, (2) to deprive any person or a class of persons the equal protection  
 15 of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the  
 16 conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a  
 17 deprivation of any right or privilege of a citizen of the United States.” *Gillespie v. Civiletti*, 629  
 18 F.2d 637, 641 (9th Cir. 1980); *see also Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971);  
 19 *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). “[T]he language requiring  
 20 intent to deprive *equal* protection . . . means that there must be some racial, or perhaps otherwise  
 21 class-based, invidiously discriminatory animus behind the conspirators’ action.” *Griffin*, 403  
 22 U.S. at 102; *see also Sever*, 978 F.2d at 1536.

23 Here, Plaintiff fails to allege membership in a protected class and fails to allege that any  
 24 Defendant acted with class-based animus, both of which are essential elements of a cause of  
 25 action under 42 U.S.C. § 1985(3). *See Griffin*, 403 U.S. at 101-02; *Schultz v. Sundberg*, 759  
 26 F.2d 714, 718 (9th Cir. 1985) (holding that conspiracy plaintiff must show membership in a  
 27 judicially-designated suspect or quasi-suspect class); *Portman v. County of Santa Clara*, 995  
 28 F.2d 898, 909 (9th Cir. 1993). Accordingly, the Court **GRANTS** Defendants’ Motions to

1 Dismiss Plaintiff's conspiracy claims brought pursuant to 42 U.S.C. § 1985(3) for failing to state  
2 a claim pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

3 Moreover, to the extent that Plaintiff seeks to bring a § 1986 conspiracy claim, he cannot  
4 do so. "Section 1986 authorizes a remedy against state actors who have negligently failed to  
5 prevent a conspiracy that would be actionable under § 1985." *Cerrato v. S.F. Cmty. Coll. Dist.*,  
6 26 F.3d 968, 971 n.7 (9th Cir. 1994). "A claim can be stated under [§] 1986 only if the  
7 complaint contains a valid claim under [§] 1985." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d  
8 621, 626 (9th Cir. 1988). Because Plaintiff is unable to state a conspiracy claim pursuant to 42  
9 U.S.C. § 1985(3), he cannot state a claim pursuant to 42 U.S.C. § 1986. Thus, Defendants'  
10 Motions to Dismiss Plaintiff's conspiracy claims brought pursuant to 42 U.S.C. § 1986 are  
11 **GRANTED** pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend.

#### 12 **H. Defendant Pegues' Notice of Joinder in Motions to Dismiss**

13 Defendant Pegues seeks dismissal of all claims against him and joins Defendants'  
14 Motions to Dismiss Plaintiff's First Amended Complaint. In Plaintiff's First Amended  
15 Complaint, he alleges, following the incident on June 10, 2005, Defendant Pegues was informed  
16 by a prison physician that Plaintiff needed to be "immediately transferred" to a hospital for  
17 further treatment. (*See* FAC ¶ 60.) Plaintiff further alleges that Defendant Pegues "refused to  
18 act or expedite Plaintiff's transfer to [the hospital]" which allowed Plaintiff's "suffering  
19 condition to deteriorate." (*Id.* ¶ 61.)

20 Defendant Pegues' Joinder fails to address these claims that are sufficient to state an  
21 Eighth Amendment deliberate indifference to serious medical need claim. Accordingly, those  
22 claims remain against Defendant Pegues.

23 Defendant Pegues does argue that he cannot be held liable for failing to file a report on  
24 Plaintiff's injuries. (*See* Joinder at 3.) The Ninth Circuit has held that an inadequate  
25 investigation alone does not "involve[] the deprivation of a protected right," but must involve  
26 "another recognized constitutional right." *See Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985).  
27 Here, while Plaintiff has stated an Eighth Amendment claim for other actions he alleges on the  
28 part of Pegues, there is no constitutional violation alleged resulting from this failure to file a

1 report. Accordingly, Defendant Pegues' Motion to Dismiss Plaintiff's Fourteenth Amendment  
2 claims pursuant to FED.R.CIV.P. 12(b)(6) is **GRANTED** without leave to amend.

3 **III.**

4 **DISMISSAL OF REMAINING UNSERVED DEFENDANTS PER FED.R.CIV.P. 4(m)**

5 Two Defendants have remained unserved in this action, Defendants Torres and Bailey.  
6 The Court has previously ordered the Attorney General's Office to obtain the last known contact  
7 information for Torres and Bailey from the California Department of Corrections and  
8 Rehabilitation ("CDCR") and provide this information to the U.S. Marshal in a confidential  
9 memorandum. (See Jan. 26, 2009 Order at 3-4.) However, Plaintiff's attempts to serve either  
10 Defendant via the U.S. Marshal was unsuccessful. Thus, Plaintiff filed another Motion  
11 requesting "the Court's assistance in initiating other appropriate mechanism[s] for locating and  
12 effecting service upon Torres and Bailey." (Pl.'s Mot. for Order to Locate at 4, Doc. No. 98.)  
13 The Court found that Deputy Attorney General Snyder fully complied with the Court's Order  
14 but the U.S. Marshal was unable to serve either Defendant with the last known address provided  
15 by the CDCR. (See April 30, 2009 Order at 1-2.) The Court denied Plaintiff's Motion and  
16 informed Plaintiff that while "an incarcerated pro se litigant proceeding *in forma pauperis* is  
17 entitled to rely on the service of the summons and complaint by the U.S. Marshal, the U.S.  
18 Marshal can attempt service only after it has been provided with the necessary information to  
19 effectuate service." (*Id.* at 2; citing *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990).

20 Plaintiff was granted one last extension of time to effect service on Defendants Torres and  
21 Bailey. Plaintiff was to effect service on these Defendants by June 12, 2009. (See Apr. 30, 2009  
22 Order at 3.) That time has passed and Plaintiff has failed to serve these Defendants.  
23 Accordingly, Federal Rule of Civil Procedure 4(m) requires their dismissal. See FED.R.CIV.P.  
24 4(m) (defendants must be served within 120 days after the filing of the complaint.); *Murphy*  
25 *Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (noting that one "becomes  
26 a party officially, and is required to take action in that capacity, only upon service of summons  
27 or other authority-asserting measure stating the time within which the party served must appear  
28 to defend."). "In the absence of service of process (or waiver of service by the defendant),"

1 under FED.R.CIV.P. 4, “a court ordinarily may not exercise power over a party the complaint  
2 names as a defendant.” *Id.*

3 For these reasons, the Court hereby DISMISSES Defendants Torres and Bailey from this  
4 action pursuant to FED.R.CIV.P. 4(m).

#### 5 IV.

#### 6 CONCLUSION AND ORDER

7 Based on the foregoing, the Court hereby:

- 8 (1) **GRANTS** Defendant Ritter’s Motion to Dismiss the Eighth Amendment claims  
9 against him pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;
- 10 (2) **GRANTS** Defendants Harmon and Duarte’s Motion to Dismiss the Eighth  
11 Amendment claims against them pursuant to FED.R.CIV.P. 12(b)(6) without leave  
12 to amend;
- 13 (3) **GRANTS** Defendants’ Motions to Dismiss Plaintiff’s Fourteenth Amendment  
14 Due Process and Equal Protection claims and dismisses these claims as to all  
15 Defendants pursuant to FED.R.CIV.P. 12(b)(6) without leave to amend;
- 16 (4) **GRANTS** Defendants’ Motions to Dismiss Plaintiff’s Fourth Amendment claims  
17 and dismisses these claims as to all Defendants pursuant to FED.R.CIV.P. 12(b)(6)  
18 without leave to amend;
- 19 (5) **GRANTS** Defendants’ Motions to Dismiss Plaintiff’s Access to Courts claims  
20 and dismisses these claims as to all Defendants pursuant to FED.R.CIV.P. 12(b)(6)  
21 without leave to amend;
- 22 (6) **GRANTS** Defendants Megia, Sandoval, Harmon, Stratton and Duarte’s Motion  
23 to Dismiss Plaintiff’s First Amendment retaliation claims pursuant to  
24 FED.R.CIV.P. 12(b)(6) without leave to amend;
- 25 (7) **GRANTS** Defendants’ Motion to Dismiss Plaintiff’s conspiracy claims and  
26 dismisses these claims as to all Defendants pursuant to FED.R.CIV.P. 12(b)(6)  
27 without leave to amend;
- 28 (8) **DENIES** Defendant Pegues’ Motion to Dismiss Plaintiff’s Eighth Amendment

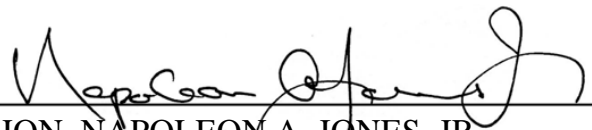
claims pursuant to FED.R.CIV.P. 12(b)(6);

(9) **DISMISSES** Defendants Torres and Bailey without prejudice pursuant to FED.R.CIV.P. 4(m); and

(10) **ORDERS** Defendants Ryan, Ochoa, Pegues, Jimenez, Zills, Schommer, Ortiz, Rodiles, Mejia, Sandoval, Wells, Castaneda, Cosio, Bell, Andalon, Stratton, Flores, Ritter, Price, Martinez, Valenzuela and Rangel to file their Answer to the claims remaining in Plaintiff's First Amended Complaint within ten (10) days of the date this Order is "Filed" pursuant to FED.R.CIV.P. 12(a)(4)(A).

**IT IS SO ORDERED.**

DATED: June 26, 2009

  
HON. NAPOLEON A. JONES, JR.  
United States District Judge